

EXHIBIT A

1 IN THE UNITED STATES DISTRICT COURT
 2 IN AND FOR THE DISTRICT OF DELAWARE
 3
 4 APPLE INC.,)
 5 -----Plaintiff,)
 6 vs.) Case No.
 7 MASIMO CORP, et al.,) 22-1377-MN-JLH
 8 -----Defendant.) 22-1378-MN-JLH

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 10 TRANSCRIPT OF DISCOVERY CONFERENCE
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13 DISCOVERY CONFERENCE had before the
 14 Honorable Jennifer L. Hall, U.S.M.J., in
 15 Courtroom 2B on the 3rd of August, 2023.

16 APPEARANCES
 17

POTTER ANDERSON & CORROON LLP
 BY: DAVID MOORE, ESQ.

-and-

WILMER CUTLER PICKERING HALE AND DORR LLP
 BY: JENNIFER MILICI, ESQ.
 MARK FORD, ESQ.
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-and-

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Counsel for Plaintiff

2 (Appearances continued.)

3 PHILLIPS MCLAUGHLIN & HALL P.A.
 BY: MEGAN HANEY, ESQ.

4 -and-

5 KNOBBE MARTENS
 BY: STEPHEN LARSON, ESQ.

6 Counsel for Defendant

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1 THE COURT: All right. So we're here
 2 for some discovery disputes. Why don't we have
 3 folks make their appearances for the record
 4 MR. MOORE: Good morning, Your Honor.
 5 David Moore from Potter Anderson on behalf of
 6 Apple. I'm joined by co-counsel from Wilmer
 7 Hale Jennifer Milici, Mark Ford, and Lydia
 8 Turnage. Also joined by Jeff Seddon and Ben
 9 Luehrs from Desmarais, and also Natalie Pous
 10 and Jack Pararas from Apple.

11 THE COURT: Hi. Good morning,
 12 everybody.

13 They've got you out numbered today.

14 MS. HANEY: Yes, Your Honor. Good
 15 morning. Megan Haney from Phillips,
 16 McLaughlin, and Hall, and I'm joined today by
 17 Steve Larson from Knobbe.

18 THE COURT: Good morning.

19 Well, I've got a giant stack of discovery
 20 disputes in front of me. I can tell you we've
 21 looked them over closely. One thing I will say
 22 is this: You probably have a better
 23 recollection of everything that's happened in
 24 this courtroom than I do because I know, and I
 25 can tell the way this case has been going, you

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4 guys have been spending a lot of time on it.
 I've got to tell you I've got hundreds of other
 cases. You may have to remind me of
 allegations and things that happened. We had a
 lot going on in the courthouse this month, as
 you all know.

So let's start with the dispute that I
 read first, which is Apple's first dispute, and
 it talks about Masimo allegedly withholding
 evidence related to antitrust.

MR. FORD: Good morning, Your Honor.
 Mark Ford. I've been here a few times. First
 time I get to talk, which is nice.

So, Your Honor, this is the first of two
 disputes that Apple brings. It relates to the
 Walker Process damages. And, frankly, this is
 about whether Apple gets any meaningful
 discovery at all into what may be the only
 claim of damages Masimo brings.

Imagine a plaintiff saying you cost me
 tens of millions of dollar because I had to
 hire a contractor, but I'm not going to give
 you the details and underlying invoices for
 what I paid for that would allow you to test
 that or substantiate whether what I'm paying

1 for is something it cost. No litigant would
 2 ever be allowed to do that. That's what Masimo
 3 wants to do here times three, because they're
 4 seeking treble damages. They want to say to
 10:09AM 5 Apple, "I want to tell you what my lawyers
 6 calculated as the portion of litigation fees
 7 which are entitled to treble damages, and you
 8 will have no ability to test that in front of a
 9 jury."

10 The DC Circuit decision in *Ideal Electric*
 11 confronts this entirely. It's the leading case
 12 that's cited in our papers. It says when a
 13 party claims litigation costs as damages, as
 14 Masimo does here, the underlying invoices are
 10:09AM 15 business records that are discoverable just
 16 like any business record underlying any damages
 17 claim, and the privilege gives way to the
 18 defendant's right to claim privilege.

19 So there are a few types of requests
 10:09AM 20 here. I'm going to start with the part of our
 21 motion that seeks underlying time entry detail.
 22 If you remember from your time in private
 23 practice --

24 THE COURT: Absolutely. And I want
 10:09AM 25 to give you a chance to say what you want to

1 say. Let me tell you what I'm thinking here.
 2 I get your point. Understood. You need to
 3 have more information to test the fact that
 4 these attorneys fees were incurred working on
 10:10AM 5 the patents that are accused of Walker Process.

6 On the other hand, I know what they're
 7 going to say, which is, they're not going to be
 8 turning over to you in realtime everything
 9 they've been doing every month on all of the
 10:10AM 10 litigation. How are we going to solve this?
 11 Because I would never order that.

12 MR. FORD: I think that makes sense.
 13 I'll cut right to the chase, which is, it
 14 sounds like you understand the relevance of it.

15 THE COURT: I absolutely do. You
 16 need to be able test whether the fees they're
 17 saying were incurred were, in fact, incurred
 18 working on particular patents. You don't need
 19 to know exactly the details about what they
 10:10AM 20 were doing on those particular patents. You
 21 don't; right? If you can have some way to test
 22 it --

23 MR. FORD: So first thing I'll say
 24 is, I actually don't think the privilege or
 10:11AM 25 sensitivity gets in the way of fundamental

1 fairness.

2 The first point I'll make, which is the
 3 fundamental part is, Masimo put these records
 4 at issue by saying essentially saying these are
 5 the amounts my lawyers claim are associated
 6 with these patents. By doing that, you can't
 7 then say, "I'm not going to allow you discovery
 8 about into what my lawyers said these patents
 9 are about." That's classic at-issue subject
 10 matter waiver. It would be like a litigant
 11 saying, "I don't willfully infringe because my
 12 lawyer said I didn't infringe. Here's a
 13 one-line e-mail that says you don't infringe,
 14 but I'm not going to produce the ten-page
 10:11AM 15 memo."

16 I think, candidly, although there's a
 17 waiver, and that's, I think, pretty clear, I
 18 think there's really not much that truly
 19 privileged. For example, the fact that
 10:11AM 20 Mr. Larson is here arguing the motion to
 21 dismiss, that fact is not privileged. He goes
 22 back tonight and writes on time entry, "Argue
 23 motion to dismiss, 1.2 hours." It doesn't
 24 become privileged. There's not any actionable
 10:12AM 25 sort of intelligence, but it does allow us to

1 test the claim. There's, frankly, no other way
 2 for us to guard against overstatement. If I
 3 could have a moment at the end --

4 THE COURT: At the end of the day,
 5 isn't it always going to be true in any case
 6 for those attorney fees? Normally, you have a
 7 billing record, and all of the billing records
 8 is what is sought as damages. And, you know,
 9 maybe there's other types of cases where you're
 10:12AM 10 seeking attorney fees and you're arguing
 11 whether or not that's reasonable. That may not
 12 be the case, but the fact that they
 13 were incurred --

14 MR. FORD: This is about allocation.

15 It's not only that it's occurred. We need to
 16 know whether -- you can't have just Masimo
 17 decide whether it's properly allocated to
 18 treble damages or not. They're only allowed
 19 treble damages for a small piece. Without
 10:12AM 20 knowing that this is drafting an interrogatory
 21 response concerning the XYZ patent, we don't
 22 know whether they're improperly allocating.

23 What I would suggest as a path forward --
 24 because I understand what you're saying. As a
 10:12AM 25 litigator, it's not like I really appreciate,

1 one, we don't need it realtime. It can trail
 2 by a couple months if that helps.
 3 Two, the vast majority of these entries
 4 really don't reveal client confidence and
 5 really don't reveal a strategy. The fact that
 6 I worked on the motion to compel isn't going to
 7 give them much advantage. To the extent
 8 there's anything in these time entries that
 9 truly does reveal a client confidence or an
 10 undisclosed, strategy, it seems like Masimo has
 11 a decision, that any company has to make.
 12 Either, one, produce it and claim damages or,
 13 two, redact it and don't claim damages.

14 What it seems like they can't do is have
 15 their cake and eat it too. There's a
 16 fundamental fairness in any damages claim.
 17 Your Honor, it's critically important not only
 18 to whether -- the exact calculation of this
 19 damage is really important in this case because
 20 I believe the incremental costs are going to be
 21 quite small if they're properly allocated. At
 22 best, seven claims of the ten. They can't
 23 recover for the cost they would have incurred
 24 anyway for the other three. But they may only
 25 prove that one of these patents was

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 1 fraudulently cured. Maybe the incremental
 2 costs they incurred that they wouldn't
 3 otherwise have to incur in defending is quite
 4 small. That's significant to present to a
 5 jury; right? Because it undermines the theme.
 6 It undermines the theme, Your Honor, that by
 7 bringing this claim it was predatory tactic.
 8 THE COURT: I get it. I get it. I
 9 get it. I think maybe what we need -- and
 10 we'll hear from the other side -- is a better
 11 understanding of what they're reporting on that
 12 billing code and maybe we can work out
 13 something where you get information about the
 14 total amount incurred and what percentage this
 15 is about. I don't want to have a situation
 16 where I'm looking at billing records, but if
 17 you're saying this evidence is critically
 18 important, I guess that's the type of thing we
 19 could do. I'm not quite sure it's necessary.
 20 Let's hear from the other side how they're
 21 billing this code and see if we can figure out
 22 a path forward.
 23 Do you understand what I'm asking?
 24 MR. LARSON: I do, Your Honor. Thank
 25 you. Steve Larson for defendant and

1 counterclaimant Masimo.
 2 As for the question of how we're willing
 3 to do the code, the attorneys have been
 4 instructed -- and I don't want to reveal
 5 anything internally about communications -- but
 6 if the work pertains to the fraudulently
 7 obtained patents, there's a special code for
 8 that the attorneys are supposed to use. If the
 9 work pertains, for example, the antitrust case,
 10 for example, what I'm doing, that's a different
 11 code. That's not a matter of damages for the
 12 jury. After the fact we're going to seek
 13 attorney's fees, but that's not going to be
 14 part of the damages claim. That's not because
 15 of the fraudulent patents. That's just from
 16 litigating the antitrust allegations.

17 THE COURT: What happens if the work
 18 pertains to litigation generally? Where does
 19 that get billed? Does that get allocated?

10:15AM 20 MR. LARSON: If it's work that we
 21 believe we would have done because of the
 22 fraudulent patents, then it should be billed in
 23 the fraudulent patent code. We could also --
 24 if there's questions about this sort of
 10:16AM 25 allocation, we've given them an option. We've

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 1 given them a path forward on a golden platter.
 2 They say the costs aren't that high, so I don't
 3 see a reason for burdensome discovery for
 4 something that's not going to be that great
 5 magnitude.
 6 What we've offered to them is we're going
 7 to provide invoices, monthly invoices, with the
 8 totals actually paid by Masimo that are
 9 attributed to specifically to the fraudulent
 10 patents.

11 THE COURT: Are you telling what goes
 12 to the other patents too? Shouldn't they be
 13 able to know what percentage is being spent on
 14 these patents so they can eyeball it or test it
 15 to make sure it sounds reasonable?

16 MR. LARSON: Right. What we said is,
 17 in terms of total cost, if the question is, are
 18 these costs harming our ability to compete, we
 19 can give them total costs, and they can compare
 10:16AM 20 that if they want to have total litigation
 21 costs, that sort of information. These fees
 22 don't answer that, but we can provide that.

23 We can go to the jury with these monthly
 24 invoices that have the total amounts. It was
 10:17AM 25 the exact discovery provided in the *Garden* case

1 that Judge Burke was sufficient, that it was
2 proper for the expert to rely on --

3 THE COURT: Is there any objection if
4 I allocate between recoverable costs --

10:17AM 5 MR. LARSON: Not all the patents were
6 accused of fraud in that case.

7 Yes, in that case, there was an issue of
8 not all the patents being accused of fraud. In
9 that case, Judge Burke noted that he didn't see
10 a reason for the expert to have to go through
11 all the detailed hourly entries. That's really
12 the issue. We provide them invoices, provide
13 the total amounts. When you go into these
14 specific hourly entries, that's very
15 problematic and potentially prejudicial, for us
16 to give them realtime updates on what we're
17 doing.

18 THE COURT: They say they don't want
19 that anymore. That's off the table. Realtime
10:17AM 20 updates are off the table.

21 MR. LARSON: They said they might
22 want it a few months after the fact. The
23 question I have is where all this is going.
24 Are we going to have attorneys being deposed?

10:18AM 25 Are we going to have attorneys on the stand?

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1 Are we going to have a sort of minitrial on the
2 reasonableness of fees, which I think they
3 raise and argue? They're going to question
4 whether our fees are reasonable.

5 First of all, I don't think there is a
6 reasonableness requirement for damages, and
7 that's in the Judge Burke case we cited.
8 That's also a case we cited from Wisconsin,
9 that there's not a reasonable aspect. If we're
10 going to into the reasonableness of fees, I
11 think it's fair that we're going to want to
12 have assessment of their fees as well so the
13 jury can see what's reasonable. If we're going
14 to be questioned about one attorney coming to a
10:18AM 15 Delaware hearing, I should be able to point
16 out --

17 THE COURT: I'm not seeing a world
18 where we're discussing the reasonableness of
19 fees. I am seeing a world where they say
10:18AM 20 you're claiming that you spent -- whatever
21 number I throw out is going to show my lack of
22 understanding about how much this case costs.
23 They're going to say you guys want \$5 million
24 in fees for litigating these patents, and
10:19AM 25 you're going to spend that money anyway, even

1 if you didn't assert these patents. That's
2 what they want to say, so how are we going to
3 get them the information so they can say that?

4 MR. LARSON: That's the solution we
5 provided to them, which is if this is really
6 worried about the number being high with some
7 sort of audit taking place with regard to the
8 particular entries, what we've offered them is,
9 we'll go to the jury trial. You'll have your
10 jury trial with the amounts that we have. And
11 after trial, we can have an audit with a
12 special master or some other proceeding with
13 the Court, to go through the entries where the
14 damages award can only be reduced because maybe
10:19AM 15 there's an allocation error along the way.

16 This is really about a concern about the
17 damages being too high. I think that's an
18 excellent solution. I'm not sure why they
19 wouldn't accept that. I think that -- it's
10:19AM 20 also an issue of, well, we want a sense of all
21 the fees you're spending, for example, on all
22 the patents, some total number. That's
23 something we could work out. That's not
24 something they offered before, but we could
10:19AM 25 provide that if that's the question.

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1 Our real concern is these particular
2 requests are very broad and burdensome and we
3 don't want to provide hourly entries in
4 realtime. Most of Apple's case, it's really
5 after the fact entirely when anything was
6 provided.

7 I want to make a couple more points that
8 I think the default here is we do believe these
9 billing fees, hourly fees, are privileged. We
10 cited Third Circuit case. We cited a District
11 Court case from the Third Circuit on this.
12 *Montgomery* was a Third Circuit case. *Lane vs.*
13 *State Farm* was a District Court case from
14 Pennsylvania. Apple cites a treatise and a
10:20AM 15 couple cases from outside the Third Circuit,
16 but we think if you look at the caselaw we
17 cited, the default is yes, these billing
18 entries are privileged, and they're very
19 sensitive.

20 We think it would be very prejudicial,
21 and I don't know where Apple is going in terms
22 of having a trial -- if they want to have a
23 trial in front of the jury about these
24 attorneys and how they bill their time. I
10:20AM 25 don't think that's something we want to do.

1 Those are the solutions we have in mind.
 2 We've offered, at least, the idea of a
 3 post-trial sort of check or audit of the fees.
 4 We'd be open to the possibility of giving them
 10:21AM 5 a total amount on the other patents so they can
 6 compare that. That's a possibility. I'm open
 7 to other solutions.

8 Seems to me there's points I want to
 9 make.

10 The other thing about -- I do maintain
 11 that these requests in particular are very
 12 burdensome and broad and, for example, seek
 13 very detailed discovery as to all the patents
 14 at issue, all the consultants, whether we're
 10:21AM 15 seeking a fee or not, so I want to make sure
 16 that's out there.

17 THE COURT: Have a seat.

18 Why don't you tell me what is the
 19 particular problem with them going to a jury
 10:21AM 20 with the total amount that they claim -- and
 21 you've got the opportunity to say to the jury
 22 that's too high, but if the jury ultimately
 23 awards their number and they've agreed the
 24 number can only be reduced at that point by the
 10:22AM 25 Court after, is that a Seventh Amendment

1 And, number two, I want to get to the fee
 2 agreements. It's conceivable that the
 3 underlying fee agreement might show that
 4 there's no incremental costs at all. There
 10:23AM 5 might be a fixed fee agreement in place where
 6 if they prevail on only one patent, they would
 7 have incurred the same amount of fixed fee even
 8 if there were nine patents-in-suit. The
 9 result, if we're able to prove that, is they
 10 have no injury at all. They have no standing.

11 The claim fails.

12 I think this goes to the liability. It
 13 goes to the jury's understanding of the
 14 magnitude and effect. Respectfully, I don't
 10:23AM 15 think Apple can be put in a position to choose
 16 between the Seventh Amendment and the
 17 reasonable discovery. I will say this, though:
 18 He pointed to two cases the *Garden* case --

19 THE COURT: I read them. I'm good.
 10:23AM 20 I'm ready to talk about this. We've had a lot
 21 of cases with a lot of sound-bites. I get it.
 22 Here's what we're going to do: I don't
 23 think my thinking on this has changed after
 24 talking to everybody today. We all know the
 10:23AM 25 situation we're in, is that it would be great

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1 problem?
 2 MR. FORD: It's a Seventh Amendment
 3 problem because we have a Seventh Amendment
 4 right to have the jury decide the amount of
 10:22AM 5 damages, and they would be --

6 THE COURT: That's what I said, but
 7 they would be deciding it and then it would
 8 only get reduced. It would only be in your
 9 favor afterward.

10 MR. FORD: The fact that we don't get
 11 to truly test in front of the jury the amount
 12 of damages -- so they're presenting the
 13 situation where we would essentially get a
 14 black box in front of the jury and not be able
 10:22AM 15 to really get into their allocation, and the
 16 jury would assume the damages are more. And
 17 that has a significant effect, Your Honor,
 18 because there are secondary effects to these
 19 costs.

20 They're arguing that these costs impair
 21 our ability to compete, we've lost sales, we
 22 didn't invest. So the jury needs to really
 23 understand what those costs actually were to
 24 make that true assessment of whether there was
 10:22AM 25 any harm to competition, number one.

1 for your side to get all the billing records to
 2 see what they're up to. That's not going to
 3 happen. On the other hand, you get more than
 4 just a number. We need to figure out what the
 5 balance is going to be here.

6 It's not enough -- you've got to give
 7 them more than just saying here's the numbers
 8 for this billing code and it's too much to turn
 9 over all the invoices.

10 So at a minimum, what I think we need is
 11 information from Masimo provided to Apple that
 12 has to do with what the fee arrangements
 13 generally are, and that can be provided in the
 14 form of the documents or a declaration with
 10:24AM 15 attached documents, but they need to understand
 16 under oath how these fees are being charged, to
 17 and include how decisions are being made to put
 18 stuff on this billing code. I also don't think
 19 it's unreasonable for them to have an

20 understanding about what percentage of the
 21 total litigation costs the billing codes amount
 22 to.

23 And then if there are any further
 24 disputes about the details and how this is
 25 going to go forward, I'm not saying that I'm

1 not going to review billing records, and I'm
 2 not saying that billing records don't have to
 3 get produced at this point. But I hope you
 4 all, with that guidance, can work out the rest
 10:25AM 5 of this because you know what you need.

6 I don't expect -- as I'm thinking how
 7 this trial is going proceed, the biggest issue
 8 of the day is going to be whether it should
 9 have been \$4 million for billing on these
 10 patents or five or whatever it is. So I'm
 11 taking that into account, but also I don't have
 12 a sense of how much money we're talking about
 13 here. If there are further disputes about
 14 this, each side needs to come up with the most
 10:25AM 15 reasonable proposal for getting the other side
 16 what they need, and I'll just pick one. And so
 17 that's an incentive to be reasonable about it.

18 So just to be clear for the record, the
 19 ruling on this, which is pursuant to Federal
 10:26AM 20 Rule of Civil Procedure 26, this is a discovery
 21 ruling about what needs to get produced that's
 22 proportional to the needs of the case, taking
 23 into account burden.

24 Anything else?

10:26AM 25 This paragraph on page three where Apple

1 states budgets and forecasts for those fees and
 2 costs, that whole second paragraph of requests
 3 is denied.

4 All right. So let's go to Issue 2.
 10:26AM 5 Documents on factors impacting forecasts and
 6 proper billing. So you're getting forecasts
 7 and projections, but you want something else,
 8 but they say, "What do you want us to look
 9 for?" Is this dispute concrete?

10 MR. FORD: I'm hoping to clarify it.
 11 We tried during meet-and-confers, and there may
 12 be some developments that help me to clarify.
 13 They agreed to provide forecasts for the sale
 14 of the watch, the W1, maybe the Freedom as
 10:27AM 15 well. What we want is internal Masimo analysis
 16 about what's driving the forecast. What's
 17 driving demand? What factors are impacting
 18 demand?

19 And it goes to damages, Your Honor. In
 10:27AM 20 this case, across a number of claims, Masimo
 21 is, essentially, blaming Apple for
 22 underperformance in the marketplace. Blaming
 23 false advertising, blaming the alleged patent
 24 infringement, blaming the litigation costs.
 25 It's saying that it's hurting our sales. We're

1 losing sales.

2 If internally, Masimo's pointing to other
 3 market factors, just supply factors at the
 4 manufacturer, that's obviously relevant. We
 10:27AM 5 just don't want to see an expert to look at a
 6 forecast going down and blame Apple if
 7 internally what Masimo is saying is pointing to
 8 something else.

9 During the meet-and-confers, we tried to
 10 explain this to Masimo to get them to
 11 understand what we meant by "factors." I think
 12 what might clarify is the recent press release
 13 by Masimo. I'm happy to show this to you.
 14 It's very recent. It's from July 17th.

15 Basically, what happens, Masimo adjusted its
 16 guidance and forecasts and said the reason why
 17 our healthcare revenue is down relates to a
 18 number of factors: Orders were delayed,
 19 inpatient census went down, there were labor
 10:28AM 20 shortages at hospitals, our OEM partners were
 21 unable to provide patient monitoring. This is
 22 precisely the type of thing that pertains to
 23 the W1 and forecasts that's common in any case.
 24 This is why we're not doing well in the

10:28AM 25 marketplace.

1 THE COURT: Now, they say they asked
 2 you for search terms, that they'll run them for
 3 you. Did you do search terms?

4 MR. FORD: We have provided search
 5 terms. I think my concern is they're not
 6 necessarily agreeing to produce the responsive
 7 documents that hit on the search terms. So we
 8 provided search terms that, one, for purposes
 9 of e-mail collection, should, we hope, identify
 10 the documents. But then I just think we need
 11 them to acknowledge they'll produce more than
 12 just the forecasts and also produce the
 13 analysis underlying the forecast.

14 THE COURT: I think that's in their
 10:29AM 15 letter. Let's hear from them and we'll see if
 16 there's --

17 MR. FORD: And the second part is I
 18 just think this is something that you would
 19 have to do search beyond e-mail. They're
 10:29AM 20 essential files about forecasts and business
 21 plans. I would expect you can ask the company,
 22 the leadership of the group, where is the
 23 analysis that goes into forecasts? Even if
 24 it's not in certain e-mails, that's something
 25 that, as a general matter, both sides are doing

1 that essential file collection to make sure we
 2 have the key documents.

3 Thank you, Your Honor.

4 THE COURT: All right. Thank you.

10:29AM 5 MR. LARSON: First of all, I want to
 6 make clear that it's not our goal to run these
 7 search terms and not produce the documents that
 8 would result from the search terms. We saw
 9 that as a potential solution because the

10 problem with our can request is every time we
 11 ask them to sort of explain what factors may
 12 potentially impact actual or forecasted
 13 information, we get lots of different examples
 14 of different types of documents. We want to
 15 make we fulfill our discovery obligations.

16 It's very difficult, even from the last
 17 example, there was a long list of different
 18 types of documents.

19 THE COURT: But I kind of understood
 20 with that example, like, sort of what they're
 21 after. They issued a press release that says
 22 here's why we think our forecasts are the way
 23 they are. Can you talk to the folks and see --

24 MR. LARSON: I need to get a copy of
 25 the press release. I haven't seen this before.

1 documents are being sought. That's the issue
 2 with this request.

3 THE COURT: What do you need to know
 4 from him sitting here today?

5 MR. LARSON: I guess if we had a
 6 clear list of the different factors.

7 THE COURT: They don't know what the
 8 factors are. They're trying to find out what
 9 the factors are.

10 MR. FORD: I might be able to
 11 simplify. I think -- maybe this is my failure
 12 during the meet-and-confer. I'm not asking
 13 Mr. Larson, as an economist, to figure out all
 14 the potential factors and create all documents,
 15 all labor shortages, things like that. I'm
 16 asking to look at what your executives are
 17 saying are the reason why the forecasts are
 18 changing. Start with that. Start with
 19 documents and analysis about the forecast or
 20 outlook.

21 THE COURT: I don't know how these
 22 documents are kept. They might be able to look
 23 for them?

24 MR. FORD: I think there are probably
 25 e-mails between executives where they're

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1 This is brand new, but it wouldn't surprise me
 2 that Masimo would identify various factors. I
 3 don't know if that's all the factors. It
 4 sounds like a lot of different types of
 5 categories of documents. That's why we think a
 6 search term approach makes sense for this
 7 document request. Maybe a document sufficient
 8 to show factors that impact would be okay
 9 because then we could ask Masimo executives,
 10 hey, what do you think? What types of document
 11 would show this?

12 THE COURT: It's hard for me, because
 13 I don't know what the answer is. Based on what
 14 you're hearing today and based on what I'm
 15 hearing from you today, you're not saying
 16 you're not going to produce those types of
 17 documents.

18 MR. LARSON: No. I mean, our issue
 19 is not we're going to produce those types of
 20 documents. We're going to produce financial
 21 forecasts. We're going to run their search
 22 terms. We'll produce the results of the search
 23 terms. When we agree to produce documents
 24 responsive to a request, we want to make sure
 25 we know what we're supposed to do and what

1 working on the forecast and they're talking
 2 back and forth about why we should move the
 3 forecast up or down. I can't guess all the
 4 factors. I'm not a businessperson. I don't
 5 think he needs to start with the factors. I
 6 think you start with what's the work that goes
 7 into the forecast, and if those documents are
 8 showing Masimo business people point to other
 9 reasons for underperforming, the document is
 10 responsive. I can't come up with an exhaustive
 11 list of all the reasons the product is
 12 underperforming because I'm not the
 13 businessperson.

14 THE COURT: I know. Generally, the
 15 way this is done is people search with search
 16 terms.

17 MR. FORD: So we provided search
 18 terms like forecast, budget, all that stuff.
 19 You look at an e-mail, and it will be talking
 20 about the budget, and we're going to lower the
 21 forecast because our suppliers are delayed.

22 THE COURT: I'm not hearing from them
 23 they're going to withhold them. Have a seat
 24 and let them respond.

25 Do you think we might benefit from

1 additional meet-and-confer on this issue?
 2 MR. LARSON: Potentially. We're
 3 having a meet-and-confer about the search
 4 terms, of course, in general about the burden
 10:33AM 5 and how many hits they are. I think a document
 6 sufficient to show would make us more
 7 comfortable. We could talk to the executives,
 8 try figure out what the factors are and provide
 9 some category of documents. Our only concern
 10:33AM 10 is to make sure we agree to produce all
 11 documents, that we know what we're searching
 12 for and looking for.

13 THE COURT: Why don't you
 14 meet-and-confer on that. I'm not going to say
 10:33AM 15 documents sufficient to show is enough at this
 16 point, because I have no idea what exists, and
 17 sounds like you don't either.

18 So they're not refusing to produce those.
 19 Those are going to move forward in the ordinary
 10:33AM 20 course, and you all are going to meet about
 21 burden, and that's subjects to any future
 22 rulings under Rule 26.

23 So I think that's the first set of
 24 disputes, so let's move on.

10:34AM 25 So now we've got Masimo's disputes. So

30

1 let me get those pulled up. These are the
 2 disputes, also, about the antitrust
 3 counterclaims. Let's take these one by one.
 4 Go ahead, Counsel.

10:34AM 5 MR. LARSON: Thank you, Your Honor.
 6 So I'll begin with the first section of
 7 our letter, and this is where we're requesting
 8 the Court's assistance, just to begin with,
 9 before we get into particular document
 10 requests, and we want clarity that there's no
 11 general embargo on predatory infringement
 12 discovery or IOS discovery. The reason this is
 13 important is Apple says they're not going to
 14 answer 'rogs, they're not going to supplement
 15 their initial disclosures, they're not going to
 16 provide pretrial disclosures. They've asked us
 17 to not provide expert discovery on this and
 18 have expert reports on this.

19 And really, the argument has to do with
 10:35AM 20 discovery-type arguments. They're really about
 21 the Court's report and recommendation, and we
 22 don't view the Court's report and
 23 recommendation as saying that it was going to
 24 blatantly embargo discovery on those issues.
 10:35AM 25 We read it as saying the Court will consider

1 individual requests as they came up.

2 So there's been a lot of --

3 THE COURT: Let's talk about the
 4 predatory infringement request for production.
 10:35AM 5 It was very helpful that you attached as
 6 Exhibit 1 a summary of what's going on here.
 7 So which ones are the predatory
 8 infringement?

9 MR. LARSON: Predatory infringement
 10 is the next section of the letter. That's 83
 11 to 84 and 86 to 90.

12 THE COURT: 83 talks about all
 13 documents and communications referencing,
 14 relating to, or discussing the practice of
 10:35AM 15 efficient infringement for the practice of
 16 infringing and appropriating intellectual
 17 property even after being informed of such
 18 conduct because it is more advantageous to do
 19 so that to pay for lawful use or draw up the
 10:36AM 20 intellectual property.

21 That request is going to be denied as not
 22 proportional to the needs of the case.

23 What's the next one?

24 MR. LARSON: That's 83, Your Honor.
 10:36AM 25 THE COURT: Yes.

32

1 MR. LARSON: The next one is 84.
 2 THE COURT: 84. All communications
 3 with third parties related to allegations that
 4 Apple unlawfully acquired or used intellectual
 5 property. Merit two responsive documents
 6 regarding -- this sounds like a trade secrets
 7 dispute that you had with them; right? Is this
 8 something different?

9 MR. LARSON: This is something
 10 different. I think what's important here, the
 11 point I wanted to make on some of these
 12 requests, and for a number of these requests,
 13 is we saw Apple argue in its motion to dismiss,
 14 and we're going to see Apple argue again on the
 10:37AM 15 motion for summary judgment, say, "Masimo,
 16 you've only shown harm to yourself. You
 17 haven't shown harm to competition." So Apple
 18 is saying, "We'll provide these documents as to
 19 you, Masimo, but we're not going to provide
 20 discovery as to this practice as regards other
 21 parties," which is what we need to show or want
 22 to show harm to competition.

23 So I think just for a little bit of
 24 perspective here, we did take Your Honor's
 10:37AM 25 ruling into account, and I think Apple has

1 seasoned counsel that I think can confirm that
 2 the discovery we're seeking here is really a
 3 drop in the bucket to what you typically have
 4 in big antitrust cases. It's very expensive
 5 and burdensome discovery.

6 THE COURT: I understand.

7 MR. LARSON: It's really focused on
 8 the facts of what actually occurred, is what
 9 we're seeking with these requests. And I'm
 10 hoping this will be our main, only discovery
 11 dispute about antitrust discovery. These are
 12 the requests that we brought to the Court that
 13 we feel we need to be able to develop that part
 14 of the case.

10:37AM 15 THE COURT: Okay. 84 is also denied.
 16 What's the next one?

17 MR. LARSON: 86.

18 THE COURT: 86. Denied.

19 MR. LARSON: Can I ask for
 20 clarification on that?

21 THE COURT: That's denied pursuant to
 22 Rule 26. It's not proportional to the needs of
 23 the case.

24 MR. LARSON: That answered my
 25 question. So it's not a blanket embargo for

1 extent that's true, we believe it's because of
 2 the conduct that Apple engaged in.

3 THE COURT: I understand the
 4 argument, but that one is also denied. I
 5 appreciate your argument.

6 MR. LARSON: Understood.

7 Next one is 90.

8 THE COURT: Denied.

9 MR. LARSON: And next one is -- I
 10 believe that's --

11 THE COURT: Predatory infringement.
 12 MR. LARSON: Predatory infringement.
 13 THE COURT: Okay. Monopoly
 14 leveraging.

10:40AM 15 So I'm confused about 62. I'll be honest
 16 with you. It's about -- I thought the market
 17 you wanted was the market for IOS app
 18 distribution. Am I a moron? Isn't that a high
 19 percent? Don't they have a monopoly on that
 20 market? Is there something I'm not getting?
 21 What am I missing out on?

22 MR. LARSON: What they're going to
 23 argue is that's not about the market. They're
 24 going to say that it should be a broader
 25 market, and this really goes to the ecosystem

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1 predatory infringement discovery?

2 THE COURT: These particular requests
 3 are denied.

4 MR. LARSON: Thank you, Your Honor.

5 Next one is 87.

6 THE COURT: Denied.

7 MR. LARSON: Next one is 88.

8 THE COURT: Denied.

9 MR. LARSON: 89. And can I offer a

10 little bit of argument on this one.

11 THE COURT: That's fine.

12 MR. LARSON: Again, you see here,
 13 we're referring to specific parties, and these
 14 are parties that I mentioned in our complaint
 15 that we believe Apple engaged in the practice
 16 of predatory infringement with regarding these
 17 parties. And again, Apple is going to argue
 18 we're only showing harm in competition to
 19 ourselves and not these other parties. This is
 20 the type of discovery that we would seek to
 21 be able to establish that. I don't see
 22 arguments about burden or proportionality.

23 It's really just about relevance, and what
 24 Apple argues about these parties is these
 25 parties aren't in the relevant market. To the

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1 request, so I'll go back on that. That's
 2 request 112 and 114.

3 This set of requests have to do with
 4 Apple's conduct in that market, and so
 5 request -- the question of whether that is a
 6 market, 112 and 114, we'll get to that in a
 7 second unless you want to go ahead and address
 8 that. These are less about what that market is
 9 and more about the conduct in that market,
 10 showing that Apple has monopoly power in the
 11 market. And Apple hasn't conceded that. If
 12 Apple were to say that's not an issue here,
 13 that would be fine, but barring that, it's
 14 something that we need to pursue.

10:41AM 15 THE COURT: Okay. All right. So
 16 what is it -- give me the type of idea of the
 17 type of thing you're looking for in -- you want
 18 to talk about 112 first? We can talk about 112
 19 first.

10:41AM 20 So 112 has to do with documents and
 21 things referring to Apple Watch and Apple's
 22 ecosystem with interconnected products, and
 23 they don't what to produce that. No, they're
 24 happy to produce that. They just don't want to
 25 talk about stuff that doesn't have to do with

1 the watch, so whatever the hot now product is,
 2 they don't want to give you documents on that.
 3 MR. LARSON: The issue is not that --
 4 we would be happy if the ecosystem documents
 10:42AM 5 are limited to documents that also talk about
 6 the watch.

7 THE COURT: Is there a dispute on
 8 that then?

9 MR. FORD: We're happy to produce
 10:42AM 10 documents related to the ecosystem as it
 11 pertains to the watch business. It's just the
 12 stuff that's totally unrelated to the watch.

13 THE COURT: We're okay on that?

14 MR. LARSON: The issue is they said
 10:42AM 15 what they produced is not what we're seeking at
 16 all with these requests. Literally, what they
 17 say is documents showing how the ecosystem
 18 increases demand for the Apple Watch, which is
 19 not what we're trying to show here. Here,
 10:42AM 20 we're trying to show that there's a discrete
 21 market for the IOS apps, and the way you do
 22 that under caselaw show that a particular
 23 market or submarket, you show it's very sticky.
 24 You show that once a customer makes a decision,
 10:42AM 25 for example, to go with Apple, now it's in

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1 Apple's ecosystem. It's going to be stuck
 2 there, and that's under the *Kodak* case --
 3 THE COURT: Give me -- paint a
 4 picture in my mind about what type of document
 10:43AM 5 you're looking for. Give me an example.
 6 MR. LARSON: These are documents that
 7 talk about how difficult it is, for example,
 8 for a customer to leave Apple's ecosystem. In
 9 the context of the Apple Watch, it's fine. In
 10 fact, we have search terms on that. We'd be
 11 happy to rely on our search terms on that, but
 12 we want to make sure when they provide
 13 documents, they're going to provide all the
 14 documents and not limit it to documents that
 10:43AM 15 show how Apple's ecosystem increases the demand
 16 for Apple Watch, which is what they said they
 17 would provide.

18 THE COURT: Do you understand what
 19 he's talking about?

20 MR. FORD: Yeah, I think he's
 21 interpreting our statement too narrowly. I
 22 think what he's talking about is demand. We've
 23 also agreed to produce documents related to the
 24 willingness or ability of Apple Watch users to
 10:43AM 25 switch to other products.

1 THE COURT: Is everything --
 2 MR. FORD: Everything he's describing
 3 there, we're willing to produce.
 4 MR. LARSON: I'm not sure. When he
 10:44AM 5 says I think that is about demand, maybe we're
 6 two ships passing in the night. If they say
 7 they'll run the search, they'll produce the
 8 documents from the search, subject to the
 9 parties' negotiations about burden and there
 10 being too many hits, then I think we're okay on
 11 that one.

12 THE COURT: Okay. Great. We're
 13 making progress. That's 112 and 113 and that
 14 114 kind of seems the same too; is that right?

10:44AM 15 MR. FORD: That's my assessment.
 16 MR. LARSON: Those are all related.

17 Same issue.

18 THE COURT: So those are good. Let's
 19 go back, now, to 62 and 63. Is that kind of
 10:44AM 20 the same thing?

21 MR. LARSON: These have to do with
 22 market definition and market power and
 23 distribution markets and in particular -- if
 24 you give me one moment.

10:44AM 25 THE COURT: Take your time.

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1 MR. LARSON: So I mean, I think we
 2 see this as a pretty narrow request. These are
 3 literally Apple documents talking about market
 4 definition where Apple itself is saying, hey,
 5 here's what the market is. We think those
 6 documents would be very relevant to disputes,
 7 if any, about what the market is. I think
 8 there's going to be a dispute. They're going
 9 to say the market shouldn't be limited to an
 10 IOS path market.

11 This didn't come up in the motion to
 12 dismiss. They didn't challenge our allegations
 13 on that in the motion to dismiss. Clearly,
 14 it's going to be part of the dispute in the
 10:45AM 15 case. They're going to challenge in summary
 16 judgment.

17 THE COURT: Do you know what they're
 18 asking for on 62 and 63?

19 MS. MILICI: Your Honor, I understand
 10:45AM 20 what the requests say. I disagree that this is
 21 a narrow request. It's an exceptionally broad
 22 request, but in addition, it's not in service
 23 of any viable antitrust theory. This is a
 24 refusal-to-deal claim, which the Supreme Court
 10:45AM 25 said is immune from antitrust scrutiny. It's

1 given reasons why the refusal-to-deal duty
 2 should not be expanded, and that includes the
 3 risk of having central control of courts making
 4 decisions about what Apple can and can't say to
 10:46AM 5 app developers, how many days it can take to
 6 review an app.

7 A lot of these requests are in service of
 8 the refusal-to-deal claim that the Supreme
 9 Court has clearly stated is immune from
 10 antitrust scrutiny. We cited Judge Boasberg's
 11 decision in *U.S. vs. Facebook* explaining why
 12 this can't be included in a monopoly brought
 13 kind of theory. We have decisions from Judge
 14 Coe in the *Freehand* case refusing to consider
 10:46AM 15 refusal to deal in a monopoly brought claim.
 16 That's how this should be dealt with.

17 THE COURT: I agree. I appreciate
 18 it. Spoiler alert is that I'm not going to
 19 make any decisions about refusal-to-deal claims
 10:46AM 20 today, but you probably all knew I was going to
 21 say that.

22 But you have, nevertheless, offered to do
 23 some amount of discovery that would allow them
 24 to probe this issue. What --

10:47AM 25 Let me ask you, Counsel, what more

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1 besides what they've offered you think you
 2 need.

3 MR. LARSON: Well, I think on this
 4 request, they haven't offered anything, unless
 10:47AM 5 I'm mistaken. I think the issue here is that's
 6 why we want clarity about --

7 THE COURT: 62 and 63. Apple has
 8 agreed to produce -- okay. So 62 and 63.
 9 Yeah, I see. So they don't want to produce 62
 10 and 63 at all.

11 MR. LARSON: The issue of the
 12 categorical -- what they view as a categorical
 13 bar on discovery, and they made a few points in
 14 the responsive brief that I'd love to address,
 10:47AM 15 but if Your Honor --

16 THE COURT: Let's ask this. Why
 17 doesn't everybody sit down for a minute so we
 18 can be comfortable.

19 So 63 talks about all documents,
 10:47AM 20 communications, and things referring to or
 21 relating to Apple's control of IOS app
 22 distribution. I'm inclined to allow some
 23 discovery of that. They've given you the
 24 policies and things. What more do you want
 25 than that?

1 MR. LARSON: Well, they say they're
 2 going to provide just policies, and I guess if
 3 there's Apple documents discussing the fact
 4 that they control IOS app distribution, they
 5 have complete control over that, I'd be happy
 6 to narrow it to documents referring to that if
 7 that would be helpful.

8 MS. MILICI: I'm still not sure what
 9 they're looking for. These are incredibly
 10 broad requests. They're asking for how Apple
 11 views the market for distribution of apps,
 12 which is incredibly broad. I'm not sure what
 13 the narrowing is, but I do think fundamentally
 14 the issue here is that this isn't related to
 10:48AM 15 any monopolization of the health watch. This
 16 market definition exercise that they want to
 17 engage in has nothing to do with the claims,
 18 and it's disproportionate under Rule 26.

19 THE COURT: All right. I'm -- why
 10:49AM 20 don't you have a seat.

21 I'm going to ask you all to
 22 meet-and-confer on this more. I'll hear it
 23 again. I do agree that the request, as
 24 drafted, is incredibly broad. Why don't you
 10:49AM 25 come up with a proposal about how you can

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1 narrow it and an explanation as to why you need
 2 it so I can understand better, and I can hear
 3 it again if you can't get it worked out.
 4 That's 62 and 63.

5 And then we've got -- Apple has offered
 6 some stuff for 76 and 81. That's -- 81 talks
 7 about all documents, communications, and things
 8 referring or relating to Apple's App Store
 9 review guidelines as referenced in the
 10 counterclaims.

11 I don't understand what you're looking
 12 for here. Tell me the type of thing. You have
 13 the guideline itself. You want it narrowed to
 14 responsive documents relating to the relevant
 10:50AM 15 technology? What are you thinking? Like, you
 16 want to see who else they have not approved?

17 MR. LARSON: So the reference to the
 18 review guideline 1.4.1 refers to the conduct at
 19 issue here, that they would use this guideline
 10:50AM 20 to exclude competitors, and our narrowing to,
 21 essentially, health watches, apps related to
 22 health watches, is our attempt to substantially
 23 narrow the universe of potential documents to
 24 just other companies, like Masimo, with a watch
 25 with particular health features and the app

1 relating to that watch where Apple used that
2 review guideline to exclude them.

3 THE COURT: Have a seat. It's okay.
4 Did that happen? Do you have documents
10:50AM 5 like that?

6 MS. MILICI: Your Honor, I do want to
7 address this fundamental misconception of what
8 it means to show harm to competition. It
9 doesn't mean to show harm to another
10 competitor, and these companies are not
11 competitors.

12 THE COURT: I know. I'm just trying
13 to see the easiest way out of this dispute.

14 For me, the easiest way might be there are no
10:51AM 15 such documents.

16 MS. MILICI: Your Honor, what that
17 would entail is a search of every app that's
18 ever been reviewed to see whether it meets this
19 definition, and I would say it hasn't even
10:51AM 20 happened as to Masimo. Masimo's apps have been
21 available since December, despite the fact that
22 they continue to include in pleadings to this
23 Court an allegation that they have been refused
24 access. They have not. Their apps were
10:51AM 25 reviewed in a short period of time and approved

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1 and available on the App Store. This didn't
2 even happen as to them.

3 MR. LARSON: Your Honor, I would
4 disagree with that.

5 THE COURT: What's 1.4.1?

6 MS. MILICI: Your Honor, I don't have
7 the guideline in front of me, but I understand
8 it's a guideline about the review process for
9 apps that have a medical component.

10 THE COURT: You can have a seat.
11 That's fine. Everybody can remain seated.

12 I'm not going to say that this request is
13 denied at this point. Why don't we go back and
14 see what the burden is to make some production
10:52AM 15 relevant to this.

16 MS. MILICI: Your Honor --

17 THE COURT: "All documents and
18 communications and things" is way too broad.

19 MS. MILICI: I just want to be heard
10:52AM 20 on this for a second because, fundamentally, I
21 think what we're getting at here is this runs
22 into exactly what the Supreme Court said Courts
23 shouldn't be doing, which is to look at each of
24 Apple's deals and say, did Apple take too many
10:52AM 25 days to review that app? Did it ask a question

1 that the Court would prefer that it not ask?
2 This is a micromanaging of Apple's deals.

3 THE COURT: To be clear, all we're
4 talking about here today is discovery. That's
10:53AM 5 all we're talking about here today. So Federal
6 Rules of Civil Procedure 26 asks me to look at
7 whether the discovery request is proportional
8 to the needs of the case, and if I can't see
9 how much burden it is. Even if it has very
10 minimal relevance, I can't make that
11 assessment. With the record before me, I
12 can't.

13 Why don't we go back. I'm telling you on
14 its face this request is broad no matter what
10:53AM 15 the relevance. So let's go back. Nobody is
16 making any decisions about the merits at this
17 point. We're talking about discovery.

18 All right. 82. I think 82 seems
19 substantially similar to me.

10:54AM 20 MR. LARSON: Your Honor, may I
21 make -- so Apple -- at issue here is Apple
22 agreed to provide responsive documents, but
23 only if they involve Masimo. The issue is,
24 again, will this just involve Masimo? Because
10:54AM 25 they're going to argue we can't show harm to

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1 competition, are we going to get information
2 where Apple did this to other companies? I
3 disagree with some of the argument that we're
4 hearing about harm. I think harm to
5 competition and harm to Masimo is absolutely
6 relevant, and that's how you show, and I think
7 we need this to show harm to competition.

8 But that's the issue here, again, whether
9 it should just be limited to Masimo or whether
10 it should also involve other companies with
11 health-related apps.

12 MS. MILICI: Your Honor, if I can
13 respond to that, *Philadelphia Taxi* case
14 explains what harm to competition means. It
10:54AM 15 means harm to consumers. It's not, as in that
16 case, if there were more taxi operators that
17 were injured, it would change the outcome of
18 the case. The issue here is, did the harm to
19 Masimo cause a harm to consumers, not or other
10:55AM 20 companies that are not even in this market.

21 MR. LARSON: That's how you show harm
22 to competition, is to show that this is harm --
23 obviously, just harming Masimo where Masimo can
24 be a competitive force that can harm
25 competition. If Coke excludes Pepsi, that can

1 harm competition. But especially when we know
 2 they already argued it. They're going to argue
 3 it again. Masimo you only showed you were
 4 harmed. You didn't show any other party was
 10:55AM 5 harmed. That's the issue here with the
 6 discovery.

7 THE COURT: Standby. Standby.

8 Everybody take a break.

9 I'm going to need more briefing on 81 and
 10:56AM 10 82 if you all can't get it worked out.

11 MR. LARSON: Your Honor, would you
 12 like more briefing after we meet and confer?

13 THE COURT: Yes, please. Meet and
 14 confer. I'd like an understanding. I'd like
 10:56AM 15 the two parties to have an understanding what's
 16 being asked for and why that would be
 17 burdensome before I hear it again, though.

18 All right so that's 81 and 82.

19 So 80 is a strange one because 80 asks
 10:57AM 20 Apple for communications referring or relating
 21 to Masimo's strategies. What are we asking for
 22 here?

23 MR. LARSON: Away from the issue of
 24 harm to others, now we're focusing specifically
 10:57AM 25 on Masimo. And our allegations here -- and we

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1 provided a supplemental 'rog response that lays
 2 out our allegations in more detail, but the
 3 allegations are that Apple was seeking
 4 information about Masimo's FDA strategies, and
 10:57AM 5 that while we didn't give Apple the highly
 6 confidential communication with the FDA that
 7 Apple wanted, Apple had the ability to ask and
 8 receive in response to many questions, very
 9 targeted and focused questions, information
 10:57AM 10 that was not readily available that would not
 11 be readily available to other competitors.
 12 Individual pieces, you may have been able to go
 13 out and find in the public, but we put them all
 14 together and tied them up with a bow and
 10:58AM 15 provided them to Apple in response to all the
 16 specific questions, and they all have to do
 17 with our FDA strategies.

18 And the theory here and our belief is
 19 that when you look at the timing of when this
 10:58AM 20 occurred, for example, with the safety net,
 21 Apple wouldn't approve our app until Apple came
 22 out with its own pulse oximetry feature right
 23 at the time. With regard to the W1, this is
 24 the release of the W1. You have the issues
 10:58AM 25 again with Apple, that Apple was doing this to

1 obtain information about Masimo's FDA
 2 strategies because Apple was attempting to do
 3 the same.

4 This request is specifically about Apple
 5 discussing Masimo's FDA strategies, which
 6 presumably, there wouldn't be many documents
 7 about that. If there are, they would be highly
 8 relevant. That's what this request is about.

9 MS. MILICI: Your Honor, I do want to
 10 respond to some of this.

11 The theory that he's saying is that Apple
 12 took three months when it was reviewing the
 13 safety net app, which by the way, does not
 14 connect to a watch. It has nothing to do with
 10:59AM 15 watching. During two months of that time,
 16 Masimo was not responding to requests for
 17 information. But their theory is by asking is
 18 this FDA approved -- and this was an app that
 19 was supposed to be used by patients in a

20 hospital -- by asking, is this FDA approved,
 21 somehow that means that Apple violated the
 22 antitrust laws and monopolized the health watch
 23 market even though product is not a health
 24 watch. The theory here is so divorced from
 25 anything on which relief can be granted, that

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1 it cannot be proportional under Rule 26.

2 THE COURT: I understand your point.
 3 Are there really that many documents that -- no
 4 idea.

5 Yeah. So everybody is on the same page,
 6 to the extent anybody is arguing merits, I
 7 promise you, I will forget. So don't worry
 8 about correcting the record on stuff like that
 9 because I have a lot going on.

10 So the fact of the matter was is, Apple
 11 asked Masimo about FDA, Apple communication
 12 between the parties, and Apple has got some
 13 internal documents about Masimo's FDA. Figure
 14 out how burdensome that would be, and that's
 11:00AM 15 how we'll move forward on that. If it's
 16 burdensome, come back.

17 MS. MILICI: Your Honor, I just want
 18 to clarify one thing. You had asked for
 19 additional briefing on RFP 80 and 81. Should
 11:00AM 20 we also submit additional briefing on RFP 62
 21 and 63 if we're unable to reach agreement?

22 THE COURT: I'll hear it if it's a
 23 question of burden. If it's a question of
 24 relevance, I don't want to --

25 MS. MILICI: But if we can't on the

1 scope --

2 THE COURT: That's fine.

3 We've gotten to the time period issue. I
4 can tell you this one I feel comfortable with
11:01AM 5 that. I think Apple's proposal is more than
6 appropriate. So I won't hear argument on that.
7 We're going to go with Apple's proposal about
8 the time period.

9 MR. LARSON: Can I ask one point of
11:01AM 10 clarification on that? In the briefing --

11 THE COURT: I was persuaded by their
12 argument.

13 MR. LARSON: I want to clarify what
14 that time period is. In the briefing, it
11:01AM 15 suggested it may be ten months before filing
16 the complaint, and that seems very narrow.

17 THE COURT: Apple offered to extend
18 antitrust discovery to January 1, 2020.

19 MR. LARSON: Thank you, Your Honor.
11:01AM 20 THE COURT: All right. Then we've
21 got Masimo's additional letter. The first
22 issue, it looked like some stuff had happened
23 since we got the opening letter. I don't
24 really want to hear about it until after you've
11:02AM 25 had a chance to meet-and-confer about whether

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1 or not the supplement is appropriate.
2 Sometimes I want to do that while everyone is
3 here, but I don't think that's going to be
4 productive to do today.

5 And then we've got this deadline for
6 waiving privilege. Is anybody going to waive
7 privilege? Really?

8 Let's hear from Apple. You don't have to
9 tell me, but, like, do you think there should
11:02AM 10 be a deadline and what it should be.

11 MR. SEDDON: Your Honor, we don't
12 think a deadline is necessary, but to the
13 extent there is a deadline, we looked at what
14 the parties are doing in discovery, what
11:03AM 15 they're negotiating on ESI. We would be
16 prepared to give a notice, if we're going to
17 waive privilege, and I'm not forecasting that
18 we are by any means, if we were going to do so,
19 we would be prepared to do so by August 17th.

20 We think there should be a week after that to
21 provide any supplemental disclosure of
22 privilege log or whatever is necessary, so by
23 August 24th.

24 THE COURT: August 17th.

25 MR. LARSON: That's what they offered

1 in their brief. The issue is they say they're
2 going to provide the intent to waive on
3 August 17th, and then, if they don't provide a
4 date, they're going to supplement all discovery
5 including 'rog responses. We're going to get a
6 document and privilege log August 24th. It's
7 very late in process. They've had eight months
8 to decide to waive privilege. We're deciding
9 ESI search terms right now.

11:03AM 10 THE COURT: Do you think they're
11 going to waive privilege?

12 MR. LARSON: I don't know if they're
13 going to waive privilege. If they're going to
14 cite counsel, for example -- but I should point
11:04AM 15 out, Your Honor, a new development which is
16 yesterday we received a 'rog response from them
17 late last night that apparently purports to
18 assert inequitable conduct allegations against
19 Masimo. We just received that last night.

11:04AM 20 Apple has had eight months to decide whether to
21 waive privilege. I can't say -- I haven't
22 investigated whether Masimo would want to have
23 any type of waiver, but we don't think 7 days
24 10 days. What we ask for would be appropriate
11:04AM 25 as to the new allegations from Apple. Before

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1 you rule, I want to make that clear.

2 THE COURT: Look, we'll set it at
3 August 17th. That's two weeks from now, and
4 then we'll see where the chips fall and move on
5 from there. I don't know what else I can say.

6 I appreciate counsels' skill and
7 preparation and outstanding letters that I
8 received it's hard in any case, and especially
9 in this case, for the Court to make reasoned
11:05AM 10 decisions based on an incomplete record, which
11 is what I have, and I have to do the best I can
12 with the facts in front of me and, hopefully,
13 that's been apparent to you today, that I'm
14 trying to do the best I can.

11:05AM 15 You all have got I don't know how many
16 attorneys sitting in this room working on this.
17 When the disputes percolate up to me, I can
18 only do what I can do with the information I
19 have. The train is headed to the station or

20 off the cliff, but the train left the station
21 on this set of litigation. We'll see you all
22 the next time.

23 MR. LARSON: Your Honor, may I raise
24 one more topic? And we're simply seeking
25 guidance from the Court. We raised this with

1 Apple. We're not sure if a letter, whatever
 2 would be appropriate. We wanted to raise the
 3 fact that the Federal Circuit has taken en banc
 4 a number of foundational questions as to
 5 obviousness for design patents. This is pretty
 11:06AM 6 rare. It's been five years since the Federal
 7 Circuit has gone en banc. If you look at the
 8 questions the Federal Circuit is answering,
 9 they're really foundational questions that we
 11:06AM 10 think could substantially change the law on
 11 obviousness for design patents and questions
 12 for the KSR changes.

13 We raised this with Apple. It's not a
 14 situation, for example, where you have two
 11:06AM 15 alternative claim constructions. We really
 16 have no idea where the law is going to end up
 17 on this, so we think whatever reports we serve
 18 would have to be completely redone. We
 19 proposed the possibility of vacating that
 11:06AM 20 deadline and visiting this in January. We just
 21 want your guidance.

22 THE COURT: They dispute -- what's
 23 Apple's view? I assume you're disputing that.

24 MR. LUEHRS: Your Honor, they're
 11:06AM 25 trying to stay Apple's design patent claims

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1 because there's a pending issue on appeal.
 2 THE COURT: I understand. The train
 3 is going to keep plowing full speed ahead, and
 4 we'll deal with it in January when we've got
 11:07AM 5 some information from the Federal Circuit and
 6 how it shakes out.

7 Thanks, everybody.

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1 C E R T I F I C A T E

2 STATE OF DELAWARE)
 3 COUNTY OF NEW CASTLE)

4 I, Deanna L. Warner, a Certified
 5 Shorthand Reporter, do hereby certify that as
 6 such Certified Shorthand Reporter, I was
 7 present at and reported in Stenotype shorthand
 8 the above and foregoing proceedings in Case
 9 Number 22-1377-MN-JLH, *APPLE INC. VS. MASIMO*
 10 *CORP., et al.*, heard on August 3, 2023.

11 I further certify that a transcript of
 12 my shorthand notes was typed and that the
 13 foregoing transcript, consisting of 59
 14 typewritten pages, is a true copy of said
 15 DISCOVERY CONFERENCE.

16 SIGNED, OFFICIALLY SEALED, and FILED
 17 with the Clerk of the District Court, NEW
 18 CASTLE County, Delaware, this 6th day of
 19 August, 2023.

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Deanna L. Warner, CSR, #1687
 22 Speedbudget Enterprises, LLC
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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

APPLE, INC.,)
)
Plaintiff,) C.A. No. 22-1377-MN-JLH
) 22-1378-MN-JLH
v.)
)
MASIMO CORPORATION, et al.,)
)
Defendant.)

Friday, May 5, 2023
10:00 a.m.

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JENNIFER L. HALL
United States District Court Judge

APPEARANCES:

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1 THE COURT: Good morning, counsel.

2 This is Jennifer Hall. We're here on the line
3 for a scheduling conference. This is Apple
4 versus Masimo and Sound United. It's civil
5 action numbers 22-1377 and 22-1378. May I have
6 appearances, please, for plaintiffs?

7 MR. MOORE: Good morning, Your
8 Honor. It's David Moore.

9 THE COURT: Good morning, Mr.
10 Moore. Do you have others with you? You may
11 have cut out.

12 MR. MOORE: Sorry about that.
13 Bindu Palapura is with me. And our co-counsel
14 from Desmarais is on the line as well, John
15 Desmarais, Peter Magic, Jordan Malz and
16 Kerri-Ann Limbeek. We also have counsel from
17 Wilmer Hale on the line, Jennifer Milici and
18 Mark Ford. And I believe we also have in-house
19 counsel from Apple, Natalie Pous and Meaghan
20 Thomas-Kennedy on the line.

21 THE COURT: Great. Good morning
22 to all of you. Do we have counsel for the
23 defendants on the line?

24 MR. PHILLIPS: Good morning, Your
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1 Honor. This is Jack Phillips of Phillips,
2 McLaughlin & Hall and with me on the line are
3 Steve Jenson, Brian Horne, Jared Bunker, Ben
4 Katzenellenbogen, Stephen Larson and Adam Powell
5 of the Knobbe Martens firm.

6 THE COURT: Good morning to all of
7 you. So I thought that I would let you know
8 what my thoughts are and then we'll give
9 everybody a chance to ask questions at the end.
10 I anticipate we may need to get on another call,
11 but let me just tell you what I'm thinking.

12 I can tell you that we spent a
13 great deal of time looking at the docket and
14 seeing what's pending. We have a good
15 understanding about what claims are at issue in
16 the two cases and what the parties want to do
17 with respect to the schedule. I think we also
18 have a gut understanding about why they want to
19 do what they want to do. So what I'm going to
20 outline for you takes into consideration the
21 parties' pleadings, which we've reviewed, the
22 pending motions to dismiss and strike, the
23 claims and the counterclaims and the defenses.
24 We've looked carefully at the competing proposed

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1 schedules and we looked at all of the arguments
 2 made in all of the scheduling related motions to
 3 include the pending motions to expedite, to
 4 consolidate, to sever and to stay and we've also
 5 taken into account that it appears to us that
 6 this is -- well, it doesn't just appear to us,
 7 it's the case that it's not the only matter
 8 between plaintiff and defendants and these cases
 9 are part of a larger battle between the parties.
 10 You all have many cases against each other
 11 related to the products at issue and so any
 12 arguments by one side or the other side to the
 13 Court about why it would be burdensome to defend
 14 against the other side's claims are taken by the
 15 Court with a degree of skepticism. And I also
 16 think that there's no reason why the parties'
 17 claims that they've chosen to bring against each
 18 other in Delaware can't move as fast here as
 19 they have in other forums as well. I've also
 20 taken into account that there is a reason to
 21 think that some discovery relevant to this case
 22 has already been had. And the parties have
 23 suggested that they are both amenable in
 24 principle to cross these agreements that would

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1 allow discovery between the cases presently
 2 before the Court as well as including some of
 3 the discovery that they've had in the Central
 4 District of California case and the ITC case.

5 So having taken the totality of

6 these circumstances under consideration, in my
 7 view there's really only one good way to proceed
 8 that takes into account both sides' competing
 9 interests in having their claims and defenses
 10 heard both fairly and expeditiously as well as
 11 the Court's and the parties' interests in
 12 efficiency. And so here's the broad outline of
 13 the plan.

14 The cases are going to be
 15 informally consolidated for pretrial
 16 proceedings. There will be one scheduling order
 17 that will apply to both cases for pretrial
 18 proceeding. Subject to the Court's upcoming
 19 ruling on the pending motions to dismiss and
 20 strike, every claim and every defense and every
 21 counterclaim is going to go forward in discovery
 22 at this time. As I mentioned in my oral order
 23 yesterday, the Court will take up the motions to
 24 dismiss and strike claims and defenses in due

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1 course, but for now everything is going forward
 2 in discovery.

3 The cases and the claims are going
 4 to proceed forward with the idea that we will
 5 have a case management conference in January of
 6 2024, at which time we will decide which claims
 7 and defenses should proceed to trial. And
 8 should the Court determine that there are cases
 9 that should proceed to trial, the Court is going
 10 to be able to get you to trial within a month or
 11 two of January 2024. The exact date will be
 12 decided at the case management conference in
 13 January.

14 Should the parties desire to file
 15 summary judgment motions, briefing on those
 16 motions should be complete by the second week in
 17 December. If a party wishes to file more than
 18 one summary judgment motion, what we're going to
 19 do is incorporate a ranking procedure that's
 20 consistent with the procedure that Judge
 21 Connolly uses. And I know your Delaware counsel
 22 will be able to fill you in on that if you're
 23 not familiar, but the general idea is that the
 24 parties have to make clear the order in which

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1 they want their summary judgment motions heard.
 2 So the first motion the party wishes the Court
 3 to consider should be designated number one and
 4 the second motion number two and so on. And
 5 then the Court will review those motions in
 6 order. And if the Court decides to deny a
 7 motion filed by the parties, barring
 8 exceptional circumstances, the Court will not
 9 review any further summary judgment motions by
 10 that party.

11 Alternatively, if the parties want
 12 to save some time on the schedule, they can, if
 13 both sides agree, forego the opportunity to file
 14 summary judgment motions as of right and instead
 15 the Court will adopt a procedure under which the
 16 parties can file short competing letters
 17 requesting leave to file summary judgment. If
 18 the parties choose that option, those can be due
 19 two weeks before the January 2024 case
 20 management conference and we'll take them up at
 21 that conference.

22 And as I said, the plan would be
 23 to get you to trial within a month or two of
 24 January 2024. That trial may involve a formal

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1 consolidation of certain claims from each of the
 2 two actions or it may not. We'll figure that
 3 out in January. The parties can argue at that
 4 point in time about what should go forward and
 5 the Court will need a joint letter no longer
 6 than six pages, single-spaced, to be filed at
 7 least 10 days before the January 2024 status
 8 conference and the letter should indicate how
 9 the parties think the case should proceed to
 10 trial.

11 Based on what I said, I imagine
 12 that you will all want to go back and meet and
 13 confer about discovery limits and dates.

14 To the extent there is a need to
 15 have a markman hearing, I'll need a joint brief
 16 for that two weeks before whatever date you want
 17 the markman hearing to be and I can accommodate
 18 that. I'll be able to get you a ruling on any
 19 markman issues at the hearing or very shortly
 20 thereafter, but if you don't have a ruling by
 21 the time expert reports are due, the parties'
 22 experts will need to address both sides'
 23 competing claim constructions.

24 So with respect to the pending

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1 motions we've got in the 1377 case, there's a
 2 motion to expedite. That is denied. However, I
 3 will say that Apple's request for a trial eight
 4 months from the date of the scheduling order
 5 comes pretty close to what the Court has just
 6 offered on the phone today and my plan is to
 7 keep the trial pretty close to eight months from
 8 the day we're going to enter the scheduling
 9 order. With respect to, again, the 1377 and the
 10 1378 cases, the motion to consolidate cases,
 11 that's going to be denied, because we're not
 12 going to have formal consolidation at this time.
 13 The cases, however, will be informally
 14 consolidated for scheduling and discovery and we
 15 can re-raise at the case management conference
 16 any arguments that the claims should be tried
 17 together.

18 In 1378 we've got a motion to
 19 sever certain of the counterclaims in that case.
 20 That's denied without prejudice to re-raise at
 21 the January 2024 case management conference.
 22 And then we have also a motion to stay discovery
 23 pending a resolution of a motion to dismiss and
 24 that's denied.

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1 I know what you all are probably
 2 wondering, which is is Judge Noreika going to go
 3 for this and the answer to that is yes. I
 4 actually have spoken with her about the pending
 5 motions and she and I each independently came up
 6 with the plan that I have outlined for you
 7 today, which indicates to me that it's a good
 8 plan and it's the right way to proceed.

9 So I don't know where we are with
 10 the 26-day disclosures and the initial patent
 11 disclosures. At least based on the competing
 12 proposed schedules that you all filed a couple
 13 weeks ago, it looked to me like we were making
 14 some progress, so hopefully those things can be
 15 incorporated into whatever you all come up with,
 16 but I'd like you all to have a proposed
 17 scheduling order with any additional disputes
 18 based on the plan that I've outlined set forth
 19 in that and then if we need to get back on the
 20 phone we can. Hopefully we can get that revised
 21 scheduling order within a week.

22 So does anyone have any questions
 23 from plaintiff's side?

24 MR. DESMARAIS: Hello, Your Honor.
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1 This is John Desmarais for Apple. Your plan
 2 sounds like a good one and we have no questions
 3 and we appreciate the Court's hard work to come
 4 up with the plan. So thank you.

5 THE COURT: Great. Thanks very
 6 much. Any questions from defendants?

7 MR. HORNE: No, Your Honor. This
 8 is Brian Horne for defendants and I echo Mr.
 9 Desmarais's sentiments.

10 THE COURT: Fantastic. Well,
 11 let's get crackin' on these claims. So we'll
 12 look forward to getting a scheduling from you in
 13 a week. Thank you, everybody. Bye bye.

(End at 10:15 a.m.)

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1 State of Delaware)

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2 New Castle County)

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5 CERTIFICATE OF REPORTER

6

7 I, Stacy M. Ingram, Certified Court Reporter
8 and Notary Public, do hereby certify that the
9 foregoing record, Pages 1 to 13 inclusive, is a true
10 and accurate transcript of my stenographic notes
11 taken on May 5, 2023, in the above-captioned matter.

12

13 IN WITNESS WHEREOF, I have hereunto set my
14 hand and seal this 5th day of May 2023, at
15 Wilmington.

16

17

18 /s/ Stacy M. Ingram
19 Stacy M. Ingram, CCR

20

21

22

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